No. _____

In The
Supreme Court of the United States

GEORGE L. YOUNG AND
KATHLEEN I. McCONNELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit is incorrectly applying a plain error standard of review to sentences imposed prior to the holding in *United States v. Booker* in a manner which conflicts with the other Circuits, especially where the co-petitioners specifically objected to each applicable guideline adjustment prior to sentencing which was held prior to the *Booker* opinion?

2. Whether the District Court improperly assessed a four level upward enhancement under § 2F1.1(b)(8)(A) (2000) of the United States Sentencing Guidelines for jeopardizing the safety and soundness of a financial institution and whether this adjustment constitutes an incorrect application of the sentencing guidelines where the banks were not insolvent and never fell to the lowest composite regulatory rating?

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PETITION FOR WRIT OF CERTIORARI

George L. Young and Kathleen I. McConnell respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion in the Court of Appeals for the Eighth Circuit affirming the sentence of the District Court is reported in *United States v. Young*, 413 F.3d 599 (8th Cir. 2005), and is reprinted in the Appendix hereto at App. 1-14.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on July 5, 2005. App. at 1. Co-petitioners, George Young and Kathleen McConnell, timely filed a petition for rehearing and rehearing en banc in the Court of Appeals for the Eighth Circuit. On August 22, 2005, the Court of Appeals for the Eighth Circuit issued an order denying both the petition for rehearing and rehearing en banc. App. at 55. The present petition for writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3.

Petitioner George Young and Petitioner Kathleen McConnell, as parties interested jointly in the judgment sought to be reviewed, file this petition jointly pursuant to Supreme Court Rule 12.4.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for a writ of certiorari, filed by a party

to a federal criminal case, to review the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Sentencing Guideline § 2F1.1(b)(8)(A) (2000) which reads:

> (b) Specific Offense Characteristics
>
> (8) If the offense –
>
> (A) substantially jeopardized the safety and soundness of a financial institution;
>
> – increase by 4 levels

United States Sentencing Guideline § 2F1.1(b)(8)(A) comment. (n. 20) (2000) which reads:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the

> offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

STATEMENT OF THE CASE

A grand jury indictment was returned charging Mr. Young and Ms. McConnell with two counts of mail fraud in violation of 18 U.S.C. § 1341, one count of wire fraud in violation of 18 U.S.C. § 1343, one count of making false statements in violation of 15 U.S.C. § 50 and one criminal forfeiture count in violation of 18 U.S.C. § 982. App. at 1-2.

Mr. Young and Ms. McConnell voluntarily appeared before the court and entered pleas of guilty to each charge of the indictment. App. at 1. The guilty pleas were the result of a written plea agreement between the parties and the government. App. at 1. The district court had proper jurisdiction pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

Mr. Young and Ms. McConnell were business associates in several businesses which primarily involved buying and selling cattle as well as cattle management. App. at 2. Mr. Young is seventy-five years old and a long-time cattle rancher. Ms. McConnell is fifty-six years old and is an accountant. Mr. Young and Ms. McConnell conducted business with individual investors who were guaranteed fixed returns. App. at 2. Following a decline in the cattle

business, co-petitioners could not meet the guaranteed rates of return to their customers. App. at 2. As a result, they began the process of engaging in fictitious transactions to satisfy their clients' demands. App. at 2. For several years, the petitioners were able to provide a return to their clients. However, the business finally collapsed in 2001. App. at 2. The co-petitioners voluntarily contacted the United States Attorney's Office for the Western District of Missouri, closed their businesses, and filed for bankruptcy protection. App. at 73.

At the time that the co-petitioners came forward, the cattle business owned approximately 17,000 head of cattle. App. at 2. Yet, they represented that they owned nearly 343,000 head of cattle. App. at 2. For guideline purposes, the loss was approximately $147 million as to individual investors. App. at 2. The banks lost approximately $36 million. App. at 2. Approximately $16 million was recovered from assets of the companies and distributed to the alleged victims. App. at 2.

Specifically, three different Nebraska banks were allegedly placed in substantial jeopardy when individual investors were unable to pay back loans after the cattle business collapsed in 2001. App. at 7. The banks allegedly placed in jeopardy included: Elkhorn Valley Bank & Trust, the Bank of Madison, and the First National Bank of Beemer. App. at 7. The Federal Deposit Insurance Corporation (FDIC) rated the banks as part of its regulatory examination process following the collapse of the business. App. at 7-8. The FDIC noted that the banks' losses, "stemmed from a high concentration of loans to a particular group of cattle buyers, but otherwise characterized the bank's management as strong." App. at 8. Co-petitioners argued on direct appeal that the practices of

bank management contributed to the bank losses. App. at 10. In other words, the misconduct of the co-petitioners was not the sole reason the banks were allegedly in jeopardy. Further, the banks never achieved a rating lower than a four.[1] App. at 8.

The court conducted a sentencing hearing on May 24, 2004. App. at 16, 36. The district court made several adjustments to Petitioner George Young's base offense level of six. App. at 3. There was an eighteen level increase for amount of loss pursuant to United States Sentencing Guideline Manual (U.S.S.G.) § 2F1.1(b)(1)(S) (2000); a two level increase for more than minimal planning pursuant to U.S.S.G. § 2F1.1(b)(2) (2000); a two level increase for using sophisticated means pursuant to U.S.S.G. § 2F1.1(b)(6)(C) (2000); a four level increase for substantially jeopardizing the safety and soundness of a financial institution pursuant to U.S.S.G. § 2F1.1(b)(8)(A) (2000); a two level increase for an offense involving the violation of a prior administrative order pursuant to U.S.S.G. § 2F1.1(b)(4)(C) (2000); and a three level decrease for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b) (2000). App. at 3. The court then departed an additional two levels downward for Mr. Young's extraordinary acceptance of responsibility and

[1] The FDIC rates banks on a scale of 1 to 5, with 1 indicating that the bank has a strong performance and is of little supervisory concern, 2 indicating that a bank is fundamentally sound and provides no material supervisory concerns; 3 indicating some supervisory concern but failure is unlikely; 4 indicating concerns regarding unsafe or unsound practices such that a failure is a distinct possibility if weaknesses are not addressed and resolved; and 5 indicating extremely unsafe or unsound practices such that failure is highly probable. App. at 8.

extensive cooperation. App. at 3. This downward adjustment resulted in a sentencing range of 87-108 months. App. at 3. The court sentenced Mr. Young to 108 months. App. at 3. The court applied the same adjustments to Ms. McConnell's base offense level except for the two level increase for violation of a prior administrative order. App. at 3. Ms. McConnell also received a two level downward departure for extraordinary acceptance of responsibility and exceptional cooperation with law enforcement and the bankruptcy authorities, which resulted in a sentencing range of 70-87 months. App. at 3. The court imposed a sentence of 87 months. App. at 3. Co-petitioners were also ordered to pay restitution in the amount of $182,981,100.05. App. at 15-54. Co-petitioners submitted a joint sentencing memorandum objecting to all enhancements to their sentence. App. at 71-83. The district court rejected all objections to the enhancements. App. at 3.

Co-petitioners appealed to the Eighth Circuit challenging the applicability of the enhancement for substantially jeopardizing the safety and soundness of a financial institution. App. at 3. Following their plea and sentencing, but prior to their appeal, this Court issued opinions in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 125 S.Ct. 738 (2005). Co-petitioners also argued on direct appeal that the application of the enhancements by the district court violated the Sixth Amendment as construed in *Blakely* and *Booker, supra*. The Eighth Circuit issued an opinion on July 5, 2005, which was reported as *United States v. Young*, 413 F.3d 727 (8th Cir. 2005) affirming the judgment of the district court. App. at 1-14. Petitioners filed a timely petition for

rehearing and rehearing en banc which was denied on August 22, 2005. App. at 55.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT IS INCORRECTLY APPLYING A PLAIN ERROR STANDARD OF REVIEW TO SENTENCES IMPOSED THAT ARE CONTRARY TO THE HOLDING IN *UNITED STATES V. BOOKER* AS THIS REVIEW STANDARD CONFLICTS WITH OTHER CIRCUITS ESPECIALLY WHEN CO-PETITIONERS SPECIFICALLY OBJECTED TO EACH APPLICABLE GUIDELINE ADJUSTMENT PRIOR TO THEIR SENTENCING WHICH WAS HELD PRIOR TO THE *BOOKER* OPINION.

A. Plain Error Standard of Review

The Eighth Circuit decided the co-petitioners' *Booker* issue under the plain error standard of review. App. at 6. This ruling is consistent with Eighth Circuit cases which have held that a failure to make a specific objection to the mandatory nature of the Sentencing Guidelines, or a specific Sixth Amendment challenge, results in a plain error standard of review. *See United States v. Pirani*, 406 F.3d 543, 550-52 (8th Cir. 2005) (en banc). Co-petitioners suggest that this was the improper standard of review in light of circuit precedent prior to *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and in light of the recent split of other circuit courts in the aftermath of *United States v. Booker*, 125 S.Ct. 738 (2005).

It is not reasonable to require a criminal defendant to make a specific *Booker/Blakely* type of objection and prior

to the issuance of either opinion. At the time co-petitioners were sentenced, such an objection was entirely contrary to circuit precedent. The clear and unambiguous law in the Eighth Circuit before *Booker* and *Blakely* holdings was that this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not apply to the Sentencing Guidelines calculations and enhancements. In fact, precedent in the Eighth Circuit described the *Apprendi* argument that a sentencing court could not judicially find facts by a preponderance of the evidence as "frivolous." *United States v. Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003). The Eighth Circuit had specifically rejected the argument before petitioners were sentenced. *Id.*; *see also United States v. Alvarez*, 320 F.3d 765, 766-67 (8th Cir. 2002) ("[W]e have squarely rejected these contentions" that *Apprendi* invalidated findings under the Guidelines); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 157 (2003); *United States v. Diaz*, 296 F.3d 680, 683 (8th Cir. 2002), *cert. denied*, 537 U.S. 940 (2002).

In light of these holdings, the co-petitioners were effectively prejudiced by the application of the restrictive plain error standard because they failed to make a specific objection challenging the mandatory nature of the Guidelines even though such an objection was contrary to all circuit precedent at the time and even labeled as "frivolous" by one opinion. The prejudicial nature of the application of this standard of review was arguably recognized by several district courts in the Eighth Circuit that concluded that a general objection was sufficient to preserve *Blakely/Booker* error. *See, e.g., United States v. Coffey*, 395 F.3d 856, 860-61 (8th Cir. 2005), *affirmed*, 415 F.3d 882 (8th Cir. 2005) (en banc); *United States v. Selwyn*, 398 F.3d

1064, 1066-67 (8th Cir. 2005); *United States v. Sdoulam*, 398 F.3d 981, 995 (8th Cir. 2005); *United States v. Fox*, 396 F.3d 1018, 1026-27 (8th Cir. 2005). These opinions were overruled by *Pirani*, 406 F.3d at 550, but their initial conclusions indicate that several courts recognized the difficulty with making a *Blakely/Booker* objection under the circuit court precedent at the time.

The co-petitioners specifically objected to every enhancement proposed by the Pre-Sentence Investigation Report. App. at 71-83. The co-petitioners' Joint Sentencing Memorandum outlines the detailed objections that were made as to each of the enhancements. App. at 71-83. It was co-petitioners' understanding from the then current precedent in the Eighth Circuit that a specific *Apprendi* objection was frivolous and would not be recognized by the court at the time of sentencing. Co-petitioners were justified in relying on such precedent and should not be penalized by requiring use of the plain error standard of review to the issues raised in their appeal.

B. Circuit Split

In addition to the objection to the overall use of an improper standard of review, the co-petitioners also suggest the Eighth Circuit is currently mis-applying the plain error standard of review to cases involving *Booker* issues that were not specifically raised at the district court level. *See Pirani*, 406 F.3d at 550-52. In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993), this Court held that in order to satisfy the plain error test, the defendant must demonstrate (1) error, (2) that it is plain, and (3) that it affects substantial rights. If these three prongs are satisfied, the appellate court may, in its discretion, notice

the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781 (2002).

The Eighth Circuit, as well as other circuits, have defined *Booker* error as an error that is plain. Similarly, the Eighth Circuit has found that the third prong of the plain error test turns on whether a defendant "has demonstrated a reasonable probability that he would have received a more favorable sentence with the Booker error eliminated by making the guidelines advisory." *Pirani*, 406 F.3d at 551, *see also United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert. denied*, 162 L.Ed. 2d 866, 125 S.Ct. 2935 (2005).

Currently, there is a circuit split regarding the approach taken by the Fifth, Eighth, and Eleventh Circuits with regard to the third prong of the plain error test. The Eighth Circuit has found that a "reasonable probability" of a violation of substantial rights does not exist simply because a sentence was imposed at the bottom of the guideline range. *Pirani*, 406 F.3d at 551. The *Pirani* court suggests that if the "district court had opined that the sentence produced by the mandatory Guidelines was unreasonable" such opinions might be relevant, but that a general dislike of the guidelines as set forth in the record was not relevant to plain error review. *Id.* at 553, n.6; *see also, United States v. Fields*, 408 F.3d 1356 (11th Cir. 2005); *United States v. Leisure*, 412 F.3d 857 (8th Cir. 2005).

The problem with such a review is outlined in *United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005), where the court found that, "The existence of prejudice

should not turn on how vocal the district judge was." The Ninth Circuit agreed in stating:

> It would be most unfair and unreasonable for us to ground our prejudice on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines, or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained to quietly follow the law. Our judicial system is predicated on judges following the law, and, so far as is humanly possible, keeping their personal opinions to themselves.

United States v. Ameline, 409 F.3d 1073, 1105 (9th Cir. 2005).

The Eighth Circuit analysis is also contrary to other circuits that have expressly found a sentence at the low end of the guideline range was sufficient to meet the third prong of the plain error analysis. *See United States v. Henry*, 408 F.3d 930 (7th Cir. 2005); *United States v. Hamm*, 400 F.3d 336 (6th Cir. 2005).

The Second, Seventh, Ninth and D.C. Circuits have held that prejudice in the context of *Booker* plain error can only be assessed by a limited remand to the district court for a determination of whether the same sentence would have been imposed under an advisory guideline system. *See, e.g., United States v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005); *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Ameline, supra*.

The Third Circuit took it a step further and remanded every case with a *Booker* issue pending on direct review in

order to, "Ensure that each defendant to whom *Booker* applies is sentenced accordingly. This approach results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in the administration of justice and efficient use of judicial resources." *United States v. Davis*, 407 F.3d 162, 165 (3rd Cir. 2005). The co-petitioners respectfully suggest that they are entitled to this approach.

The approach favored by the Fifth, Eighth, and Eleventh Circuits was criticized harshly by Judge Posner of the Seventh Circuit in *Paladino, supra*. He stated, referring to *Rodriguez, supra*, "Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence." *Paladino*, 401 F.3d at 485. He also opined that, "The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge." *Id.* at 483.

The co-petitioners and others in the Eighth, Fifth, and Eleventh Circuits are currently having their unconstitutional sentences reviewed under a more burdensome standard of review than those in other circuits around the country. Such a difference results in a conflict that can only be reconciled by review of this Honorable Court. This Court should grant this Petition for Writ of Certiorari in order that the administration of justice is properly and uniformly administered in all circuit courts which involve defendants of like standing.

II. THE DISTRICT COURT IMPROPERLY ASSESSED A FOUR LEVEL UPWARD ENHANCEMENT UNDER § 2F1.1(b)(8)(A) OF THE UNITED STATES SENTENCING GUIDELINES FOR JEOPARDIZING THE SAFETY AND SOUNDNESS OF A FINANCIAL INSTITUTION WHICH CONSTITUTES AN INCORRECT APPLICATION OF THE SENTENCING GUIDELINES WHERE THE BANKS WERE NOT INSOLVENT AND NEVER FELL TO THE LOWEST COMPOSITE REGULATORY RATING

This Court recognized a core concern in *Apprendi* that a criminal defendant should have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of the guilty plea. *Apprendi,* 503 U.S. at 478. Although the Sentencing Guidelines are now advisory, they still serve the basic goal of Congress in diminishing sentencing disparities and increasing sentencing uniformity. *See Booker*, 125 S.Ct. at 759, 761. The Guidelines must still be applied correctly when taken into account in determining a defendant's sentence. *United States v. Mashek,* 406 F.3d 1012, 1015 (8th Cir. 2005). The Eighth Circuit's opinion for the upward enhancement constitutes an incorrect application of the Guidelines.

A. An Upward Enhancement Based on § 2F1.1(b)(8)(A) Was Not Justified by the Factual Record, In That, the Banks Were Never In "Substantial Jeopardy" Demonstrating an Important Question of Federal Law That Should be Settled by This Court.

At sentencing, the Pre-Sentence Investigation Report (PSI) recommended an upward enhancement of four levels

because the offense for which the co-petitioners had pled guilty substantially jeopardized the safety and soundness of several financial institutions pursuant to United States Sentencing Guidelines § 2F1.1(b)(8)(A).[2] The district court upwardly enhanced co-petitioners' guideline range accordingly. App. at 3. The resulting range for petitioner Young was 87-108 months of which the district judge imposed a sentence of 108 months. App. at 3. The resulting range for petitioner McConnell was 70-87 months of which the district judge imposed a sentence of 87 months. App. at 3. The Eighth Circuit affirmed the sentence. App. at 3.[3]

U.S.S.G. § 2F1.1(b)(8)(A) (2000) reads:

> If the offense –
>
> (A) Substantially jeopardized the safety and soundness of a financial institution . . . increase by 4 levels

Application Note 20 further defines the applicability of this enhancement as follows:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the

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[2] Co-petitioners were sentenced under the 2000 edition of the United States Sentencing Guidelines. As of 2001, the guideline for substantially jeopardizing the safety and soundness of a financial institution is found in § 2B1.1(13)(B)(i) and still recommends an enhancement of four levels under the provision.

[3] The Petitioner recognizes that Rule 10 of the Supreme Court Rules states that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. This case presents a rare circumstance due to the scope and extent of the prejudice that results from the erroneous application of the enhancement.

> offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

U.S.S.G. § 2F1.1(b)(8)(A), comment. (n. 20) (2000).

The evidence demonstrated that none of the events listed in Application Note 20 occurred. There was no evidence that these three banks became insolvent, were forced to reduce benefits, or were unable to refund any deposit, payment, or investment. There was no evidence that the assets of the banks were so depleted that they were forced to merge with another institution to continue active operations. The only issue was whether the institutions were placed "in substantial jeopardy" of having any of the events described in Application Note 20 occur.

According to the Eighth Circuit, the "fighting issue" is whether the banks in question were placed in "substantial jeopardy." App. at 11. The Eighth Circuit explored the issue of whether the resulting significant losses and precarious position of the banks satisfied the purpose of the enhancement. App. at 11. However, none of the banks fell to the lowest composite regulatory rating of 5, which notes that a bank has extremely unsafe and unsound practices or conditions, and that failure is highly probable. App. at 8. In fact, none of the banks were ever rated lower than a 4, and all were able to timely raise sufficient capital to restore their bases to an adequate level. App. at 11. These facts, contrary to the opinion issued by the Eighth Circuit, fail to meet the standard of "substantial jeopardy."

B. Assuming the Banks Were Placed In "Substantial Jeopardy," Deficient Management Practices at the Banks Substantially Contributed to Such Jeopardy And Neither Petitioner Had a Relationship With the Object Banks.

The banks themselves created the over-concentration of credit that led to their condition. App. at 9. The Eighth Circuit opinion states that while the concentration of credit was a concern, the concentration in a single source of repayment "is not bad." App. at 10. The opinion concludes that the offense need not be the sole cause of the jeopardy to the banks' safety and soundness. App. at 10. The Eighth Circuit overlooked facts concerning the banks which demonstrate that their condition was created by the banks' lending practices and not as a result of the co-petitioners' offense conduct.

FDIC regulators testified that both Elkhorn Valley and the Bank of Madison had an over-concentration of debt in cattle investments. App. at 9. This fact was noted by the Eighth Circuit in its opinion. App. at 9. The Eighth Circuit found that the management team at each bank was strong. App. at 9. This finding constitutes clear error. As noted in co-petitioners' Petition for Rehearing:

> With respect to Elkhorn, the regulators noted after the offense: Management and board performance is deficient given the level of problems and excessive risk exposure. Most of the bank's financial problems stem from the large loan losses associated with the Eggerling et al. lines. Inadequate diversification of risk in the loan portfolio is a primary factor contributing to the extent of the losses. With respect to Madison, the regulators similarly noted as follows: While

> many of the financial problems stem from the large loan losses caused by the cattle fraud scheme, the losses and overall increase in classifications were amplified by deficient management practices and must be corrected.

(App. Rehearing 11)

By overlooking these important facts, the Eighth Circuit has effectively punished co-petitioners for the deficient management practices of the object banks. The question arises as to whether it is fair to significantly increase a defendant's sentence for "substantially jeopardizing" the safety and soundness of a financial institution where the financial institutions' own management substantially contributed to their condition.

The Eighth Circuit panel also concluded in affirming the district court's application of the enhancement that a "fraudulent act need not be directly targeted at a financial institution in order for the guideline to apply so long as the institution is harmed as a collateral effect of the fraudulent conduct." App. at 9, *citing United States v. Collins*, 361 F.3d 343, 349 (7th Cir. 2004). Co-petitioners respectfully submit that there must be some type of connection between the petitioners' relationship with the bank and the corresponding effect on the financial institution in order for the four level enhancement to apply. It does not appear that the Eighth Circuit has addressed a situation where this guideline enhancement is applied to a defendant who failed to maintain a business relationship with the object bank.

In short, the management of the banks contributed to their financial troubles. (Rehearing 11) The co-petitioners are being prejudiced by assessing this enhancement even

though the banks were participating in deficient management practices. None of the banks had their FDIC ranking reduced to the lowest level. None of the banks were unable, after an ascertainable capital infusion, to restore their FDIC rankings within a short period of time to a 1 or a 2. The fact that the requirement of "substantial jeopardy" was not satisfied suggests that the enhancement under § 2F1.1(b)(8)(A) was improperly applied. The co-petitioners were not customers of the banks at issue. The co-petitioners were prejudiced by the district court's application of this enhancement. This Honorable Court should grant this Petition for a Writ of Certiorari in order to address a fundamental guideline adjustment which arises in the context of a wide variety of federal prosecutions involving commercial or banking transactions. There needs to be further clarity to the application of this particular guideline. Removing the ambiguity of the scope and extent of this guideline will assist not only the petitioners, but will better facilitate the administration of justice in other white-collar prosecutions.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX INDEX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2386	*	
United States of America,	*	
Appellee,	*	
v.	*	Appeals from the United States District Court for the Western District of Missouri.
George L. Young,	*	
Appellant.	*	
No. 04-2400	*	[PUBLISHED]
United States of America,	*	
Appellee,	*	
v.	*	
Kathleen I. McConnell,	*	
Appellant.	*	

Submitted: April 13, 2005
Filed: July 5, 2005

Before MURPHY, HANSEN, and BENTON, Circuit Judges.

HANSEN, Circuit Judge.

Pursuant to written plea agreements, George L. Young and Kathleen I. McConnell pleaded guilty to mail fraud, 18 U.S.C. § 1341 (2000), wire fraud, 18 U.S.C. § 1343 (2000), making false statements, 15 U.S.C. § 50 (2000), and criminal forfeiture, 18 U.S.C. § 982 (2000), related to a

scheme to defraud investors in their cattle businesses. Young appeals the 108-month sentence imposed by the district court,[1] and McConnell appeals her 87-month sentence. We affirm.

I.

Young, a longtime cattle rancher, and McConnell, an accountant, were involved in various related business entities that were engaged in the cattle buying and management business throughout the 1980s and 1990s. Appellants engaged in fictitious transactions and represented to their clients and to banks that their businesses owned many more cattle than actually existed. Following a decline in the cattle market, the scheme eventually collapsed in 2001, causing Young and McConnell to close their businesses and file for bankruptcy protection. At the time, their businesses owned 17,000 head of cattle, although their records reported assets consisting of over 343,000 head of cattle. Their scheme cost individual investors approximately $147 million and cost banks approximately $36 million. Nearly $16 million was recovered from assets of the companies and distributed to the fraud victims.

Following their indictment on fraud charges, the appellants cooperated extensively with the government agencies that were investigating the fraud. Both appellants entered into written plea agreements and pleaded guilty to each of the charges. At sentencing, the district court made the following adjustments to Young's base

[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri.

offense level of six: an eighteen-level increase based on the amount of the loss, U.S. Sentencing Guidelines Manual (USSG) § 2F1.1(b)(1)(S) (Nov. 2000); a two-level increase for more than minimal planning or a scheme to defraud more than one victim, USSG § 2F1.1(b)(2); a two-level increase for using sophisticated means, USSG § 2F1.1(b)(6)(C); a four-level increase for substantially jeopardizing the safety and soundness of a financial institution, USSG § 2F1.1(b)(8)(A); a two-level increase for an offense involving the violation of a prior administrative order, USSG § 2F1.1(b)(4)(C); and a three-level decrease for acceptance of responsibility, USSG § 3E1.1(b). The court then departed downward two levels for Young's extraordinary acceptance of responsibility, resulting in a sentencing range of 87-108 months, and sentenced Young to 108 months of imprisonment. The court applied the same adjustments to McConnell's base offense level except for the two-level increase for violation of a prior administrative order. After a two-level downward departure for extraordinary acceptance, McConnell faced a sentencing range of 70-87 months and received an 87-month sentence.

At sentencing, both defendants challenged the USSG § 2F1.1(b)(8)(A) four-level enhancement for jeopardizing a financial institution, and Young challenged the § 2F1.1(b)(4)(C) two-level enhancement for violation of a prior administrative order. The district court rejected both challenges. On appeal, the defendants again challenge the applicability of those same enhancements that they objected to at sentencing, and they argue that application of the enhancements violated the Sixth Amendment as construed in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), and *United States v. Booker,* 125 S. Ct. 738 (2005).

II.

A. Blakely/Booker Challenge

Each of the appellants' written plea agreements contained an appeal waiver that provided: "The defendant agrees not to appeal or otherwise challenge the constitutionality or legality of the Sentencing Guidelines." (Plea at ¶ 12.) Appellants argue that the appeal waivers contained in their plea agreements do not foreclose their *Blakely* challenge because the waiver was not knowing, having been entered pre-*Blakely*, and because the plea agreements made an exception to the plea waivers for sentences above the statutory maximum. (Appellants' Br. at 29 n.4.) Their arguments are unavailing. "[T]he right to appellate relief under *Booker* [or *Blakely*] is among the rights waived by a valid appeal waiver, even if the parties did not anticipate the *Blakely/Booker* rulings." *United States v. Fogg*, No. 04-2723, 2005 WL 1186535, at *2 (8th Cir. May 20, 2005); *see also United States v. Reeves*, No. 04-2356, 2005 WL 1366432, at *3 (8th Cir. June 10, 2005) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." (Modification in original) (internal marks omitted)); *United States v. Killgo*, 397 F.3d 628, 629 n. 2 (8th Cir. 2005) ("The fact that [the defendant] did not anticipate the *Blakely* or *Booker* rulings does not place the issue outside the scope of his waiver."); *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992) ("[Defendant]'s assertion that he cannot waive an unknown right is baseless."), *overruled on other grounds by United States v. Andis*, 333 F.3d 886, 892 n.6 (8th Cir.) (en banc), *cert. denied*, 540 U.S. 997 (2003).

We have recognized that an appeal waiver does not preclude an appeal in certain limited circumstances, including the appeal of an illegal sentence. *See Andis*, 333 F.3d at 891-92 (noting that an illegal sentence is included within the miscarriage-of-justice exception to our otherwise strict enforcement of an unambiguous appeal waiver). "[A] sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime." *Id.* at 892 (internal citation and marks omitted). Both of the appellants pleaded guilty to counts two and three of the indictment, each of which subjected them to a statutory sentence of not more than 30 years of imprisonment. *See* 18 U.S.C. §§ 1341, 1343. Young's 108-month sentence and McConnell's 87-month sentence are well below the applicable statutory maximum; indeed, they are not even one-third of the maximum. Although the argument that each Guidelines range defines a separate statutory maximum was a plausible argument following the Supreme Court's decision in *Blakely*, the Supreme Court ultimately remedied the Sixth Amendment concern with the Guidelines by making the Guidelines advisory rather than mandatory. *See Booker*, 125 S. Ct. at 764-66. Post-*Booker*, the Guidelines ranges are merely advisory ranges, and the criminal statute of conviction provides the maximum statutory sentence. As such, neither of the appellants' sentences was above the applicable statutory maximum of 30 years of imprisonment, and the miscarriage-of-justice exception for an illegal sentence does not apply. *See Reeves*, 2005 WL 1366432, at *3 (rejecting a miscarriage-of-justice claim where the sentence was within the range set by the statute of conviction).

During oral argument, counsel for appellants further argued that they were not challenging the constitutionality of the Guidelines as a whole, but rather the level of the burden of proof required to sustain the specific enhancements. This too is unavailing. Their argument that the enhancements had to be found by a jury beyond a reasonable doubt derives from the Sixth Amendment, a constitutional challenge that they both waived. As neither appellant otherwise challenges the validity of the plea agreement, we hold that their broad waivers of the right to appeal the constitutionality or legality of the Guidelines encompasses a *Blakely/Booker* challenge, and we need not reach the merits of the claim. *See Fogg,* 2005 WL 1186535, at *2.

Even assuming that the appellants did not waive this claim, we would review for plain error, and we find none. *See United States v. Pirani,* 406 F.3d 543, 550-52 (8th Cir. 2005) (en banc) (describing the four-part plain error test of *United States v. Olano,* 507 U.S. 725, 731 (1993)). The district court departed downward two levels for each defendant based on their extraordinary acceptance of responsibility, but then sentenced each appellant at the top of their respective range. In doing so, the district court stated that "the harshness of the sentence from where I sit and perhaps from where the defendants sit is due because of the heinous nature of the offense" (Sent. Tr. at 215), comparing sentences for white collar crimes to the generally harsher sentences imposed for bank robberies and concluding that "this is just punishment" (*Id.*). Neither appellant can "demonstrate a reasonable probability that the court would have imposed a lesser sentence" had it known that the Guidelines were merely advisory at the time of the sentencing hearing. *Pirani,* 406 F.3d at 553.

B. USSG § 2F1.1(b)(8)(A) enhancement for substantially jeopardizing the safety and soundness of a financial institution.

Both defendants preserved the right to appeal the application of those Guidelines enhancements that they contested at sentencing. The district court increased both defendants' sentences by four levels for substantially jeopardizing the safety and soundness of a financial institution. *See* USSG § 2F1.1(b)(8)(A). The Guideline application notes explain that "[a]n offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; . . . was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above." USSG § 2F1.1, comment. (n.20). We focus on whether the appellants' actions placed any bank "in substantial jeopardy of" becoming insolvent or being forced to merge with another bank. We review the district court's application of the Guidelines de novo, but its underlying factual findings for clear error. *See United States v. Mathijssen*, 406 F.3d 496, 498 (8th Cir. 2005).

The appellants' cattle-buying customers borrowed large sums of money from various banks to fund their cattle investments. The government introduced evidence at the sentencing hearing concerning three Nebraska banks: the Elkhorn Valley Bank & Trust (Elkhorn Valley), the Bank of Madison, and the First National Bank of Beemer, each of which suffered large losses when their bank customers were unable to repay the loans taken out to fund investments in the appellants' cattle. The Federal Deposit Insurance Corporation (FDIC) examined each of

the banks as part of its regulatory examination process. Each of the banks had received high composite ratings of 1 or 2 prior to the discovery of the appellants' fraud.[2] Following the discovery of the fraud and the resulting loan losses, the FDIC rated Elkhorn Valley a composite rating of 4 and categorized its capital position as "critically undercapitalized," the lowest capitalization category available under the FDIC's rating system. With its capital ratio under two percent, the FDIC required Elkhorn Valley to raise an additional $4 million of capital within 90 days, without which Elkhorn Valley would have been placed into receivership by the FDIC and sold. Elkhorn Valley was unable to obtain capital from its regular sources and ultimately raised the $4 million from family members and senior bank officers, who cashed in IRAs and mortgaged their homes. Elkhorn Valley's president testified that without the additional capital, the bank would have been sold. Even after the additional $4 million in capital, Elkhorn Valley remained "significantly undercapitalized," the second-lowest capital rating.

The FDIC considered the Bank of Madison to be "significantly undercapitalized" following the discovery of the fraud and the resulting loan losses, and it gave the Bank of Madison a composite rating of 4 until it could raise an additional $2.5 million in capital. The FDIC rated

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[2] The FDIC rates banks on a scale of 1 to 5, with 1 indicating that a bank has strong performance and is of little supervisory concern; 2 indicating that a bank is fundamentally sound and provides no material supervisory concerns; 3 indicating some supervisory concern but failure is unlikely; 4 indicating concerns regarding unsafe or unsound practices such that failure is a distinct possibility if weaknesses are not addressed and resolved; and 5 indicating extreme unsafe or unsound practices such that failure is highly probable. (Appellants' Br. at 9-10.)

the First National Bank of Beemer a composite 3 rating, requiring a $2.5 million capital infusion to return it to an adequate capitalization position from a "significantly undercapitalized" position. The FDIC examiners noted that part of each bank's loan losses stemmed from the high concentration of loans to a particular group of cattle buyers, but otherwise characterized each bank's management team as strong.

The appellants raise several issues concerning the application of this enhancement to their sentences. First, they argue that USSG § 2F1.1(b)(8)(A) should apply only where the financial institution is a direct victim of the offense conduct. The plain language of the Guideline is not so limiting, and the Guideline applies "[i]f the offense substantially jeopardized the safety and soundness of a financial institution." USSG § 2F1.1(b)(8)(A). "[A] fraudulent act need not be directly targeted at a financial institution in order for the guideline to apply so long as the institution is harmed as a collateral effect of the fraudulent conduct." *United States v. Collins*, 361 F.3d 343, 349 (7th Cir. 2004) (construing the 1997 version of the enhancement, then located at USSG § 2F1.1(b)(6) (1997)). We decline to adopt the appellants' argument that this enhancement applies only when the financial institution is a direct victim of the fraud.

We also reject any assertion that it was not foreseeable to the appellants that their fraudulent actions would jeopardize the safety and soundness of banks with which they were not directly involved. The Eggerling group of investors, who obtained at least part of its funding from Elkhorn Valley, lost over $30 million from the appellants' scheme. Given this level of investing, it was reasonably foreseeable to the appellants that their investors would be

borrowing money from banks and using the cattle purportedly bought from the appellants as collateral for the loans. In fact, the investors' banks, including Elkhorn Valley, performed inspections of the appellants' operations and cattle in an effort to ensure the security of the collateral backing the loans made to the appellants' investors. The appellants well knew that the consequences of their fraud extended well beyond their own banks and their individual investors.

The appellants also argue that the banks' overconcentration of credit to a single group of customers contributed to the extent of the losses, such that the banks' losses were not "a consequence" of their fraudulent activity. The FDIC examiners testified that while concentration of credit was a concern that required special attention by the FDIC and by a bank's management team, in and of itself a concentration of credit in a single source of repayment is not bad. It was only when it was discovered that the collateral and the source of repayment for the concentration of credit – the cattle – never existed due to the fraudulent actions of the appellants that the banks actually suffered the significant losses and capital depletion. We agree that the language relied upon by the appellants requires some kind of causal connection between the offense and the substantial jeopardy to a bank's safety and soundness. *See* USSG § 2F1.1, comment. (n.20) ("An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' *if, as a consequence of the offense,* the institution . . . was placed in substantial jeopardy of any of the above." (emphasis added)). Nothing in that language requires that the offense be the sole cause of the jeopardy to the bank's safety and soundness. Clearly, the jeopardy in which the

banks were placed was a direct consequence of the appellants' fraud.

The fighting issue concerning this enhancement is whether the safety and soundness of any of the banks was "substantially jeopardized." The appellants argue that none of the banks was ever rated lower than a composite 4 by the FDIC, and that all of the banks were able to timely raise sufficient capital to restore their capital bases to adequate levels. Notwithstanding, we agree with the district court that the significant losses and resulting precarious position, especially of Elkhorn Valley, satisfy the purpose of the enhancement. After accounting for the loan losses caused by the fraud, Elkhorn Valley's capital base was eroded to a position of being "critically undercapitalized," with a capital ratio of less than two percent. Only through Elkhorn Valley's president's extraordinary efforts was it able to raise the $4 million within the time necessary to avoid being placed into receivership by the FDIC. Even after the $4 million capital infusion, Elkhorn Valley remained "significantly undercapitalized," with a capital ratio of just 2.9 percent. (Sent. Tr. at 14.) The district court found, and we see no clear error in its finding, that "but for the conduct of the defendants, these banks, particularly Elkhorn [Valley] Bank, would not have been placed in such serious jeopardy." (Sent. Tr. at 196.) The district court appropriately applied the enhancement. *See United States v. Brierton*, 165 F.3d 1133, 1136 (7th Cir. 1999) (affirming application of the enhancement where the district court found that "had it not been for . . . [the defendant] resigning and the installation of a new president, the credit union faced a real danger of closing or going into receivership") (internal marks omitted, alteration in original).

C. USSG § 2F1.1(b)(4)(C) enhancement of Mr. Young's sentence for violating a prior administrative order.

The district court imposed a two-level enhancement to Young's offense level because his offense involved "a violation of a[] prior, specific . . . administrative order . . . not addressed elsewhere in the guidelines," USSG § 2F1.1(b)(4)(C), specifically the prior United States Department of Agriculture (USDA) administrative orders related to previous Packers and Stockyards Act violations. Young argues on appeal that the imposition of the enhancement constituted impermissible double-counting because his sentence included a guilty plea to Count Four of the indictment, charging him with making false entries in accounts and records required to be maintained under the Packers and Stockyards Act. The USDA had issued three orders to Young in 1979 and 1986, requiring him to keep accounts, records, and memoranda that fully disclosed all transactions involved in his business as a market agency or dealer subject to the Packers and Stockyards Act.

"Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been . . . accounted for by application of another part of the Guidelines." *United States v. Fortney*, 357 F.3d 818, 821-22 (8th Cir. 2004) (internal marks omitted, alteration in original). In computing Young's offense level in the presentence report, the probation officer grouped the multiple counts of conviction pursuant to USSG § 3D1.2(d), which requires grouping where the offense level is determined primarily on the basis of the total amount of the loss. Young started with a base offense level of six, USSG § 2F1.1(a), to which

an eighteen-level enhancement was added based on the amount of the loss, USSG § 2F1.1(b)(1)(S). The other enhancements (more than minimal planning, use of sophisticated means, and jeopardizing a financial institution) were not related to the Packers and Stockyards Act record-keeping violation. Even though Young's sentence included his conviction for violating the Packers and Stockyards Act, the amount of the loss inflicted, rather than the Packers and Stockyards Act records violation, determined Young's adjusted offense level. The effect of the grouping meant there was no "counting" of the Packers and Stockyards Act violation in calculating Young's ultimate sentence, and that violation was not determinative of any part of the eventual 108-month sentence. Thus, the USSG § 2F1.1(b)(4)(C) enhancement for violating a prior USDA administrative order did not result in impermissible double-counting because it did not increase his "punishment on account of a kind of harm that ha[d] already been . . . accounted for by application of another part of the Guidelines." *Fortney*, 357 F.3d at 821-22 (holding that there was no impermissible double counting where, as a result of the grouping rules, an enhancement for endangering human life by manufacturing methamphetamine was not otherwise accounted for in calculating the defendant's offense level) (internal marks omitted, second alteration in original).

In addition, we agree with the government that violation of a prior administrative order represents a different harm than a current violation. "A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment." USSG § 2F1.1, comment. (n.6) (explaining application of

§ 2F1.1(b)(4)(C)). *See also United States v. Maloney*, 406 F.3d 149, 153-54 (2d Cir. 2005) (holding that application of § 2F1.1(b)(4)(C) for violating a prior child support order was not impermissible double-counting on a conviction for willful failure to pay child support, where the offense level for the underlying conviction was based on the amount of harm to the child support recipient under USSG § 2B1.1 and did not itself account for the separate harm inflicted upon the state's adjudicative processes). Thus, the fact that Young was convicted for a current violation of the Packers and Stockyards Act does not take into account his aggravated conduct of simultaneously disregarding three prior administrative orders concerning similar conduct. Application of the enhancement required by § 2F1.1(b)(4)(C) merely recognizes Young's recidivism – his willingness to repeatedly disregard prior administrative orders – as a basis for increasing his sentence.

III.

The district court's judgments are affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA	**Case No.: 02-00312-01-CR-W-FJG**
-vs-	**USM Number: 15606-045**
GEORGE L. YOUNG	J. R. Hobbs, Retained 1101 Walnut St., Suite 1300 Kansas City, MO 64106-2122

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty on 10/24/03 to Counts 1 thru 5 of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341, 2, & 3571(d)	Mail Fraud	September 20, 1999	1
18 U.S.C. § 1343, 2, & 3571(d)	Wire Fraud	March 14, 2000	2
18 U.S.C. § 1341, 2, & 3571(d)	Mail Fraud	July 25, 2001	3
15 U.S.C. 50 & 18 U.S.C. 3571(b) & (e)	False Statement	August 17, 2000	4
18 U.S.C. 982(a)(1)(C) & 28 U.S.C. 2461	Criminal Forfeiture		5

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: May 24, 2004

/s/ **FERNANDO J. GAITAN, JR.**
FERNANDO J. GAITAN, JR.
UNITED STATES DISTRICT JUDGE

May 26, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **108 Months**.

Count 1 – 60 months; Counts 2 & 3 – 108 months, each count; Count 4 – 36 months. All terms to run concurrent.

The Court recommends to the Bureau of Prisons:

Defendant serve period of incarceration at the Federal Prison Camp in Leavenworth, KS.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons **before 2:00 P.M. on June 28, 2004.**

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term **5 years**. Counts 1 & 4 – 3 years, each count; Counts 2 & 3 – 5 years, each count. All terms to run concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall pay any restitution balance during the first **52 months** of supervision on the schedule set by the Court.

2. The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the Probation Office.

3. The defendant shall provide the Probation Office access to any requested financial information.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have read the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

_____ _____

Defendant Date

_____ _____

United States Probation Officer Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Restitution
$400.00 Counts 1 thru 4 – $100, each count	$	$182,981,100.05

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

You are hereby ordered to begin payment immediately and continue to make payments to the best of your ability until this obligation is satisfied. While in custody you are directed to participate in the Bureau of Prisons Financial Responsibility Program, if eligible, and upon your release from custody you shall adhere to a payment schedule as determined by the Probation Office.

Name	Address	Total Loss Amount & Restitution Ordered
James Avery	26501 S. Harvest Lane Crete, IL 60407	$32,000.00
George Baker George Baker Living Trust	P.O. Box 104493 Jefferson City, MO 65110-4493	$10,000.00

John Bandstra	308 Elm Pella, IA 50219	$648,505.03
Kenneth Blane Campbell	116 East Ashley Street Jefferson City, MO 65101	$10,000.00
Cal Bliss	1640 Juno Trial Unit 102-A Astor, FL 32102	$264,612.14
Jeff Bogaards d/b/a JB Ranch	601 Hwy T14 Pella, IA 50219	$589,894.75
Jill and Don Bonfiglio	336 Leitch Avenue La Grange, IL 60525	$10,000.00
Darrell Boot	524 Highway T14 Pella, IA 50219	$151,417.00
Vernon Boot	2205 Dubuque Street Pella, IA 50219	$375,437.30
Brad Boswell d/b/a Boswell Livestock	1888 Harbor Hill Drive Pella, IA 50219	$973,549.92
Janet Bowman	24705 130th Avenue Eldridge, IA 52748	$184,246.79
Gale Bretschneider	Route 2, Box 660 Pierce, NE 68767	$149,914.00
Jerry Bundage	RR 1, Box 154 Princeton, MO 64673	$254,882.74
Hilda Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$170,000.00
Alaina Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$2,000.00

Anthony Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$2,068.00
Russell Cooley	Box 88 Lucrene, MO 64555	$2,235,204.41
Gene Cowan	Route 2, Box 207 Unionville, MO 63565	$1,367,504.25
Richard and Angela Currey	14934 N. Circle Omaha, NE 68137	$621,540.35
Harry Floyd d/b/a Harry Floyd Livestock	P.O. Box 189 411 Market Street Waynesboro, TN 38485	$66,807.01
Don DeCook	1627 Highway 65 & 69 Indianola, IA 50125	$189,993.91
Robert and Sandy DeCook	1404 University Street Pella, IA 50219-1905	$290,617.80
Bill Determan d/b/a Bill Determan Farms	2188-250th Street Early, IA 60535	$200,206.23
Bill and Susan Determan Susie D's Farms, Inc.	2188-250th Street Early, IA 60535	$463,022.34
Darrell Dieleman	2299 Dakota Drive Pella, IA 50219	$320,952.10
Thorne Donnelley, Jr.	209 Banyan Road Palm Beach, FL 33480	$277,171.92
Dale and Dorothy Due	RR2, Box 63 Friend, NE 68359	$1,762,107.55

Timothy and Kim Due	RR2, Box 51 Friend, NE 68359	$1,483,626.92
Loren Eckert	84270 574th Avenue Pilger, NE 68768	$494,927.44
James Eggerling Eggerling Farms, Inc.	8673 Laurel Drive Pinellas Park, FL 33777	$5,212,692.97
Gerald Eggerling	1704 Sheridan Drive Norfolk, NE 68701	$5,561,539.10
Gerald Eggerling G.E. Cattle Co.	1704 Sheridan Drive Norfolk, NE 68701	$5,212,692.97
Robert Eggerling RL Financial Group	5098 White Pine Circle NE St Petersburg, FL 33703	$8,528,205.00
Sandy Eggerling S.E. Farms	4427 Pine Omaha, NE 68105	$824,455.77
Tim Eggerling T.E. Farms	1861 South 147th Circle Omaha, NE 68114	$1,070,170.71
James Eggerling Eggerling Investments, Ltc.		$5,561,539.19
Mason Fleenor	5607 270th Street Ida Grove, IA 51445	$476,408.32
Richard and Stuart Fox d/b/a Fox Cattle Company	RR2, Box 157 Broken Bow, NE 68822	$121,898.35
Mike Frazier	2421 Country Point Lane Wentzville, NE 63385	$715,053.97

Anthony Fritchey	P.O. Box 64865 12540 Bethel Road Seneca, MO 64865	$251,436.58
George and Mary Fritchey	P.O. Box 588 12540 Bethel Road Seneca, MO 64865	$822,447.20
Garrett Scott First National Bank Northeast	21125 Shilioh Circle Elkhorn, NE 68022	$1,477,641.36
Bill Gary	1601 NW Expressway Oklahoma City, OK 73118	$93,983.56
Jerry and Mary Grauf Grauf Cattle Farms, Inc.	P.O. Box 77 Elvaston, IL 62334	$4,357,929.87
Jim and Dorothy Hammond d/b/a J & D Livestock, LLC	#2 Flower Lane Terrace Moberly, MO 65270	$281,977.85
Deb Hansen	2464 2nd Road Wisner, NE 68791	$97,091.73
Forrest Hansen d/b/a FDH Farms	2464 2nd Road Wisner, NE 68791	$97,091.73
Mark Hansen	510 South Lincoln Odebolt, IA 51458	$1,095,643.20
Randall Harper	2626 Westbrook Way Columbia, MO 65203	$20,000.00
Harry Hayes	Box 148 Ida Grove, IA 51445	$3,015,645.15
John Allen Houchins a/k/a Allen Houchins	3173 McComb Street Woodburn, IA 50275	$568,804.30

Dallas Houchins	3173 McComb Street Woodburn, IA 50275	$5,600.00
James Houchins	3173 McComb Street Woodburn, IA 50275	$5,600.00
Sara Houchins	3173 McComb Street Woodburn, IA 50275	$8,000.00
Jesske Judson	7117 Phoenix Drive Lincoln, NE 68516	$107,824.17
David Jones c/o William Zysblat	110 West 57th Street 7th Floor New York, NY 10019	$2,933,160.00
Robin Jordening c/o Currey's of Nebraska	72180 566th Avenue Fairbury, NE 68352	$405,407.65
Louie Kamerick	1784 Fox Ridge Road Pella, IA 50219	$3,114,001.31
Denny Kolb United Bank of Iowa f/d/a Ida	5757 180th Street Holstein, IA 51025	$570,355.70
Jeff Krupicka Central Plains Land & Cattle	3400 NW 126th Street Lincoln, NE 68524-8827	$6,537,343.41
Rick Kuchta Kuchta Farms, Inc.	RR1, Box 9 Randolph, NE 68771	$4,588,692.97
Rich Kuchta		$5,561,539.19
James McLean	Route 1, Box 64 Grand River, IA 50108	$103,027.28
Allan Messinger d/b/a A & I Stables	HCR 62, Box 6 Hayes Center, NE 69032	$633,685.61

Michael Patrick Michael Maakestad	614 Linburg Pella, IA 50219	$424,044.39
Jean Mitchell	329 West Calwell Paris, MO 65275	$11,000.00
Kent Murphy	Route 2, Box 49 Powersville, MO 64672	$119,385.48
Richard and Kathy Murphy	Route 2, Box 49 Powersville, MO 64672	$49,185.48
Craig Nelson	RR2, Box F Newman Grove, NE 68758	$52,033.97
Merle Nelson	RR2, Box F Newman Grove, NE 68758	$52,033.97
Alan Neuberger	12900 Woodson Overland Park, KS 66209	$2,754,680.23
Dennis O'Brien	757 Tanglewood Lane Frankfort, IL 60423	$40,000.00
Terrence O'Brien	109 Martin Lane Alexandria, VA 22304	$40,000.00
Randy Oertwick	84141 574th Avenue Pilger, NE 68768	$1,729,867.78
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Alfred Neuberger Cattle Comp	12900 Woodson Overland Park, KS 66209	$3,026,148.18
Estate of William Bogaards Gaass, Klynn & Boehlje	P.O. Box 67 729 Main Street Pella, IA 50219	$1,663,072.56
Currey Kids, Inc.	4911 N. 26th Street Suite 100 Lincoln, NE 68521	$6,184,958.71
Currey Land Company	4911 N. 26th Street Suite 100 Lincoln, NE 68521	$3,451,533.21

Currey's of Nebraska	4911 N. 26th Street Suite 100 Lincoln, NE 68521	$3,373,755.48
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Hoffman Brothers	RR#1, Box 60 Kellerton, IA 50133-9725	$18,763.19
LAN Cattle Company	12900 Woodson Overland Park, KS 66209	$2,061,388.35
McLean Cattle, Inc.	409 South 17th Street Omaha, NE 68102	$1,597.30
Rob-Run, Inc.	2021 South Lewis Avenue Suite 740 Tulsa, OK 74104	$619,552.00
United Producers, Inc.	5909 Cleveland Avenue Columbus, OH 43231	$1,868,208.44
Circle H Ranch	Highway 41 North Lake City, FL 32056	$193,781.59
Rio Timba, Inc.	Rt. 1, Box 64 Grand River, IA 50108	$4,649,199.00
Ramsey Corporation	111 Antelope Street Scott City, KS 67871	$396,806.75
Estate of Richard VanLunen	6851 Oak Hall Lane Suite 300 Columbia, MD 21045	$1,494,500.00

Farmers Bank of Norther Missouri	1604 Main Street P.O. Box 186 Unionville, MO 63565	$152,009.56
Miller Feedlot, Inc.	RR2, Box 35 Grant City, MO 64456	$96,774.34
Doernemann Cattle, LLC	276 5th Road Dodge, NE 68633	$99,665.62
Harry Floyd Livestock Co.	411 Market Street Waynesboro, TN 38485	$99,120.16
SELLERS TOTAL		**146,981,100.05**
First National Bank of Omaha		$11,500,000.00
US Bank National Association		$11,500,000.00
US Bank National Association		$13,000,000.00
DIRECT LENDING INSTITUTIONS TOTAL		**$36,000,000.00**
GRAND TOTAL		**$182,981,100.05**

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 2612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The Court has determined that the defendant does not have the ability to pay interest, and it is ordered that:

The interest requirement is waived for the restitution.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Lump sum payment of $182,981,500.05 due immediately, balance due in accordance with F below.

F. Special instructions regarding the payment of criminal monetary penalties:

If unable to pay the full amount of restitution immediately, the defendant shall make payments of at least 10 percent of earnings while incarcerated, and monthly payments of $200.00 or 10 percent of gross income, whichever is greater, while on supervision. No further payment shall be required after the sum of the amounts actually paid by all defendants has fully compensated the victims.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several Restitution

Defendant and Co-Defendant Names and Case Numbers, (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Kathleen I. McConnell, Case No. 03-00312-02-CR-W-FJG, joint and several amount of $182,981,100.05

The defendant shall forfeit a total of $24,539,320.00 as a money judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA	**Case No.: 02-00312-02-CR-W-FJG**
-vs-	**USM Number: 15607-045**
KATHLEEN I. MCCONNELL	James L. Eisenbrandt, Retained 4121 W. 83rd Street, Suite 259 Prairie Village, KS 66208

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty on 10/24/03 to Counts 1 thru 5 of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341, 2, & 3571(d)	Mail Fraud	September 20, 1999	1
18 U.S.C. § 1343, 2, & 3571(d)	Wire Fraud	March 14, 2000	2
18 U.S.C. § 1341, 2, & 3571(d)	Mail Fraud	July 25, 2001	3
15 U.S.C. 50 & 18 U.S.C. 3571(b) & (e)	False Statement	August 17, 2000	4
18 U.S.C. 982(a)(1)(C) & 28 U.S.C. 2461	Criminal Forfeiture		5

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: May 24, 2004

/s/ **FERNANDO J. GAITAN, JR.**
FERNANDO J. GAITAN, JR.
UNITED STATES DISTRICT JUDGE

May 26, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **87 Months**.

Count 1 – 60 months; Counts 2 & 3 – 87 months, each count; Count 4 – 36 months. All terms to run concurrent.

The Court recommends to the Bureau of Prisons:

Defendant serve period of incarceration at the Federal Prison Camp in Greenville, IL.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons **before 2:00 P.M. on June 28, 2004.**

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By: Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term **(5) years**. Counts 1 & 4 – 3 years, each count; Counts 2 & 3 – 5 years, each count. All terms to run concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall pay any restitution balance during the first **52 months** of supervision on the schedule set by the Court.
2. The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the Probation Office.
3. The defendant shall provide the Probation Office access to any requested financial information.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have read the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation of supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant	Date
United States Probation Officer	Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Restitution
$400.00 Counts 1 thru 4 – $100, each count	**$**	**$182,981,100.05**

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant make a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

You are hereby ordered to begin payment immediately and continue to make payments to the best of your ability until this obligation is satisfied. While in custody you are directed to participate in the Bureau of Prisons Financial Responsibility Program, if eligible, and upon your release from custody you shall adhere to a payment schedule as determined by the Probation Office.

Name	Address	Total Loss Amount & Restitution Ordered
James Avery	26501 S. Harvest Lane Crete, IL 60407	$32,000.00
George Baker George Baker Living Trust	P.O. Box 104493 Jefferson City, MO 65110-4493	$10,000.00

John Bandstra	308 Elm Pella, IA 50219	$648,505.03
Kenneth Blane Campbell	116 East Ashley Street Jefferson City, MO 65101	$10,000.00
Cal Bliss	1640 Juno Trial Unit 102-A Astor, FL 32102	$264,612.14
Jeff Bogaards d/b/a JB Ranch	601 Hwy T14 Pella, IA 50219	$589,894.75
Jill and Don Bonfiglio	336 Leitch Avenue La Grange, IL 60525	$10,000.00
Darrell Boot	524 Highway T14 Pella, IA 50219	$151,417.00
Vernon Boot	2205 Dubuque Street Pella, IA 50219	$375,437.30
Brad Boswell d/b/a Boswell Livestock	1888 Harbor Hill Drive Pella, IA 50219	$973,549.92
Janet Bowman	24705 130th Avenue Eldridge, IA 52748	$184,246.79
Gale Bretschneider	Route 2, Box 660 Pierce, NE 68767	$149,914.00
Jerry Bundage	RR 1, Box 154 Princeton, MO 64673	$254,882.74
Hilda Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$170,000.00
Alaina Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$2,000.00

Anthony Ciarrocchi	743 Tanglewood Lane Frankfort, IL 60423	$2,068.00
Russell Cooley	Box 88 Lucrene, MO 64555	$2,235,204.41
Gene Cowan	Route 2, Box 207 Unionville, MO 63565	$1,367,504.25
Richard and Angela Currey	14934 N. Circle Omaha, NE 68137	$621,540.35
Harry Floyd d/b/a Harry Floyd Livestock	P.O. Box 189 411 Market Street Waynesboro, TN 38485	$66,807.01
Don DeCook	1327 Highway 65 & 69 Indianola, IA 50125	$189,993.91
Robert and Sandy DeCook	1404 University Street Pella, IA 50219-1905	$290,617.80
Bill Determan d/b/a Bill Determan Farms	2188-250th Street Early, IA 60535	$200,206.23
Bill and Susan Determan Susie D's Farms, Inc.	2188-250th Street Early, IA 60535	$463,022.34
Darrell Dieleman	2299 Dakota Drive Pella, IA 50219	$320,952.10
Thorne Donnelley, Jr.	209 Banyan Road Palm Beach, FL 33480	$277,171.92
Dale and Dorothy Due	RR2, Box 63 Friend, NE 68359	$1,762,107.55

Timothy and Kim Due	RR2, Box 51 Friend, NE 68359	$1,483,626.92
Loren Eckert	84270 574th Avenue Pilger, NE 68768	$494,927.44
James Eggerling Eggerling Farms, Inc.	8673 Laurel Drive Pinellas Park, FL 33777	$5,212,692.97
Gerald Eggerling	1704 Sheridan Drive Norfolk, NE 68701	$5,561,539.10
Gerald Eggerling G.E. Cattle Co.	1704 Sheridan Drive Norfolk, NE 68701	$5,212,692.97
Robert Eggerling RL Financial Group	5098 White Pine Circle NE St. Petersburg, FL 33703	$8,528,205.00
Sandy Eggerling S.E. Farms	4427 Pine Omaha, NE 68105	$824,455.77
Tim Eggerling T.E. Farms	1861 South 147th Circle Omaha, NE 68114	$1,070,170.71
James Eggerling Eggerling Investments, Ltc.		$5,561,539.19
Mason Fleenor	5607 270th Street Ida Grove, IA 51445	$476,408.32
Richard and Stuart Fox d/b/a Fox Cattle Company	RR2, Box 157 Broken Bow, NE 68822	$121,898.35
Mike Frazier	2421 Country Point Lane Wentzville, NE 63385	$715,053.97

Anthony Fritchey	P.O. Box 64865 12540 Bethel Road Seneca, MO 64865	$251,436.58
George and Mary Fritchey	P.O. Box 588 12540 Bethel Road Seneca, MO 64865	$822,447.20
Garrett Scott First National Bank Northeast	21125 Shilioh Circle Elkhorn, NE 68022	$1,477,641.36
Bill Gary	1601 NW Expressway Oklahoma City, OK 73118	$93,983.56
Jerry and Mary Grauf Grauf Cattle Farms, Inc.	P.O. Box 77 Elvaston, IL 62334	$4,357,929.87
Jim and Dorothy Hammond d/b/a J & D Livestock, LLC	#2 Flower Lane Terrace Moberly, MO 65270	$281,977.85
Deb Hansen	2464 2nd Road Wisner, NE 68791	$97,091.73
Forrest Hansen d/b/a FDH Farms	2464 2nd Road Wisner, NE 68791	$97,091.73
Mark Hansen	510 South Lincoln Odebolt, IA 51458	$1,095,643.20
Randall Harper	2626 Westbrook Way Columbia, MO 65203	$20,000.00
Harry Hayes	Box 148 Ida Grove, IA 51445	$3,015,645.15
John Allen Houchins a/k/a Allen Houchins	3173 McComb Street Woodburn, IA 50275	$568,804.30

Dallas Houchins	3173 McComb Street Woodburn, IA 50275	$5,600.00
James Houchins	3173 McComb Street Woodburn, IA 50275	$5,600.00
Sara Houchins	3173 McComb Street Woodburn, IA 50275	$8,000.00
Jesske Judson	7117 Phoenix Drive Lincoln, NE 68516	$107,824.17
David Jones c/o William Zysblat	10 West 57th Street 7th Floor New York, NY 10019	$2,933,160.00
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Kim Triggs	133 South Cove Drive Storm Lake, IA 50588	$1,137,040.33
Keith Tuerlow	1008 Main Street Pella, IA 50219	$401,977.32
Fred Van Ee	579-210 Avenue Pella, IA 50219	$364,134.39
Gerald Vande Kieft	2134-310 Street Oskaloosa, IA 52577	$656,304.31
Jim Vande Voort d/b/a J & J Vande Voort Farm	1760 Adams Avenue Pella, IA 50219	$276,342.40

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Lyle Vander Pol	808 Highway 10 Orange City, IA 51041	$136,866.80
Edward and Catheryn VanEe Firstar Bank	Box 194 Pella, IA 50219	$379,598.62
Harley VerMeer VerMeer Acres, Inc.	1095 Highway 102 Pella, IA 50219	$227,669.00
Gene White	1320 Twin Ridge Road Lincoln, NE 68510	$394,350.00
David and Robin Young	205 Country Club Drive New Bern, NC 28562	$650,607.00
Mike Zalman	4911 North 26th Suite 100 Lincoln, NE 68521	$1,118,813.72
Alfred Neuberger Cattle Comp	12900 Woodson Overland Park, KS 66209	$3,026,148.18
Estate of William Bogaards Gaass, Klynn & Boehlje	P.O. Box 67 729 Main Street Pella, IA 50219	$1,663,072.56
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Currey Land Company	4911 N. 26th Street Suite 100 Lincoln, NE 68521	$3,451,533.21

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Hoffman Brothers	RR#1, Box 60 Kellerton, IA 50133-9725	$18,763.19
LAN Cattle Company	12900 Woodson Overland Park, KS 66209	$2,061,388.35
McLean Cattle, Inc.	409 South 17th Street Omaha, NE 68102	$1,597.30
Rob-Run, Inc.	2021 South Lewis Avenue Suite 740 Tulsa, OK 74104	$619,552.00
United Producers, Inc.	5909 Cleveland Avenue Columbus, OH 43231	$1,868,208.44
Circle H Ranch	Highway 41 North Lake City, FL 32056	$193,781.59
Rio Timba, Inc.	Rt. 1, Box 64 Grand River, IA 50108	$4,649,199.00
Ramsey Corporation	111 Antelope Street Scott City, KS 67871	$396,806.75
Estate of Richard VanLunen	6851 Oak Hall Lane Suite 300 Columbia, MD 21045	$1,494,500.00

Farmers Bank of Norther Missouri	1604 Main Street P.O. Box 186 Unionville, MO 63565	$152,009.56
Miller Feedlot, Inc.	RR2, Box 35 Grant City, MO 64456	$96,774.34
Doernemann Cattle, LLC	276 5th Road Dodge, NE 68633	$99,665.62
Harry Floyd Livestock Co.	411 Market Street Waynesboro, TN 38485	$99,120.16
SELLERS TOTAL		**146,981,100.05**
First National Bank of Omaha		$11,500,000.00
US Bank National Association		$11,500,000.00
US Bank National Association		$13,000,000.00
DIRECT LENDING INSTITUTIONS TOTAL		**$36,000,000.00**
GRAND TOTAL		**$182,981,100.05**

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 2612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The Court has determined that the defendant does not have the ability to pay interest, and it is ordered that:

The interest requirement is waived for the restitution.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Lump sum payment of $182,981,500.05 due immediately, balance due in accordance with F below.

F. Special instructions regarding the payment of criminal monetary penalties:

If unable to pay the full amount of restitution immediately, the defendant shall make payments of at least 10 percent of earnings while incarcerated, and monthly payments of $200.00 or 10 percent of gross income, whichever is greater, while on supervision. No further payment shall be required after the sum of the amounts actually paid by all defendants has fully compensated the victims.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several Restitution

Defendant and Co-Defendant Names and Case Numbers, (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

George L. Young, Case No. 02-00312-01-CR-W-FJG, joint and several amount of $182,981,100.05

The defendant shall forfeit a total of $24,539,320.00 as a money judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2386

United States of America

Appellee,

George L. Young

Appellant.

Order Denying Petition for Rehearing and for Rehearing En Banc

No 04-2400

United States of America,

Appellee,

Kathleen McConnell,

Appellant

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied

Judges Steven M Colloton and Raymond W Gruender took no part in the consideration or decision of this matter.

5128-010199

August 22, 2005

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Appellee,	)	
v.	)	**No. 04-2386**
GEORGE L. YOUNG,	)	
Appellant.	)	
UNITED STATES OF AMERICA,	)	
Appellee,	)	
v.	)	**No. 04-2400**
KATHLEEN I. MCCONNELL,	)	
Appellant.	)	

JOINT PETITION FOR REHEARING BY THE PANEL WITH SUGGESTION FOR REHEARING *EN BANC*

Appellants George Young and Kathleen McConnell, by and through their respective counsel, submit this Petition for Rehearing by the Panel with Suggestions for Rehearing *En Banc*, pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure. The Appellants seek rehearing because the panel, in affirming the underlying sentence, overlooked a provision of the plea agreement which allowed the defendants to appeal any guideline issue that was contested at sentencing. The Appellants also seek rehearing by the Court *en banc* because the Court should reevaluate its position on the plain error standard of reviewing *Booker/Blakely* claims, and because the Court *en banc* should construe the applicability of the enhancement

under the Sentencing Guidelines for substantially jeopardizing the safety and soundness of a financial institution that is a matter of first impression in this Circuit. Consideration by the full court is necessary to address these questions of exceptional importance governing the proper application and interpretation of the United States Sentencing Guidelines, and the application of the plain error doctrine to cases that were pending on appeal when *Blakely* and *Booker* were decided.

In further support of this motion for rehearing by the panel with suggestions for rehearing *en banc*, Appellants state as follows:

I. Procedural and Factual Background

This case involved guilty pleas to mail fraud, wire fraud and false statement offenses. The guilty plea and sentencing hearing in this case occurred prior to the Supreme Court decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In the sentencing proceedings below, the defendants consistently objected to the four level enhancement for substantially jeopardizing the safety and soundness of a financial institution pursuant to U.S.S.G. § 2F1.1(b)(8)(A) (2000). With respect to Mr. Young only, an objection was made to a two level enhancement for violations of prior USDA administrative orders pursuant to U.S.S.G. § 2F1.1(b)(4) (2000). Other guideline enhancements, including amount of loss, more than minimal planning and sophisticated means, were not challenged by defendants.

After an evidentiary hearing at sentencing, the district court found facts by a preponderance of the evidence to support a finding that the defendants' conduct justified the four level enhancement for substantially jeopardizing the safety and soundness of a financial institution and the prior administrative order enhancement (for Mr. Young only). The defendants appealed these two enhancements. During the pendency of their appeal, the Supreme Court handed down its decision in both *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *United States v. Booker*, 125 S. Ct. 738 (2005).

The panel opinion in this case was issued on July 5, 2005. The opinion first concludes that the Appellants waived any right to raise a *Booker/Blakely* error in their plea agreements. (Opinion at 4-5). The panel opinion also states that even if waiver had not occurred, there has been no plain error in this case. (Opinion at 6). The opinion concludes that the four level enhancement for substantially jeopardizing the safety and soundness of a financial institution pursuant to U.S.S.G. 2F1.1(b)(8)(A) was proper. (Opinion at 6-10).

Appellants seek rehearing by the panel, or rehearing *en banc*, for the reasons that follow.

II. IN CONCLUDING THAT APPELLANTS WAIVED THEIR RIGHTS TO APPEAL BASED ON A GENERAL APPELLATE WAIVER PROVISION IN THE PLEA AGREEMENT, THE PANEL OVERLOOKED ANOTHER PROVISION IN THE PLEA AGREEMENT WHICH SPECIFICALLY PRESERVED APPELLANTS' RIGHTS TO APPEAL ANY GUIDELINE ENHANCEMENT THAT THEY CONTESTED AT SENTENCING, WHICH WOULD ALLOW FOR THE APPEAL OF THE ENHANCEMENT FOR SUBSTANTIALLY JEOPARDIZING THE SAFETY AND SOUNDNESS OF A FINANCIAL INSTITUTION ON ANY BASIS, INCLUDING *BOOKER/BLAKELY* GROUNDS

The panel opinion correctly notes that the plea agreements for both Appellants contained a standard appeal waiver provision in which the defendants agreed "not to appeal or otherwise challenge the constitutionality or legality of the Sentencing Guidelines." (Opinion at 4). Based on this language, the panel opinion concludes that the Appellants were foreclosed from raising a *Booker/Blakely* claim to their sentence. (Opinion at 4-6).

Appellants respectfully submit that the panel overlooked another key provision of the plea agreement in which the defendants specifically preserved their ability to challenge on appeal any guideline enhancement that they contested. (Plea Ag. at ¶ 12) ("The defendant agrees . . . and expressly waives the right to appeal the applicability of the U.S. Sentencing Guideline provisions specifically set forth in paragraph 11, above, either directly or collaterally, and *not otherwise contested by the defendant.")* (emphasis added). The panel opinion does not cite to or analyze in

any manner this provision in its discussion of waiver.[1] This specific reservation of the right to appeal any guideline enhancement contested by the defendants would include the right to challenge the manner in which the enhancement was determined (i.e., judicial fact-finding by a preponderance of the evidence). *See also United States v. Lea*, 400 F.3d 1115, 1116 (8th Cir. 2005) (allowing appeal where plea agreement allowed defendant to dispute at sentencing any issue not "specifically listed" in plea agreement); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (if plea agreement is ambiguous, the ambiguities are construed against the government).

The decisions cited in the panel opinion did not involve a specific reservation of the right to appeal any issue contested by the defendants at the sentencing hearing. *See, e.g., United States v. Reeves*, 410 F.3d 1031, 1033 (8th Cir. 2005) (waiver of "all rights to appeal" all issues, including, but not limited to "whatever sentence is imposed."); *United States v. Killgo*, 397 F.3d 628, 629 n.2 (8th Cir. 2005) (waiver of right to appeal "any sentence imposed" except "any issues solely involving a matter of law brought to the court's attention at the time of sentencing at which the court agrees further review is needed"); *United States v. Fogg*, 409 F.3d 1022, 1025 (8th Cir. 2005) (waiver of right to appeal, except for upward departures). These cases are distinguishable from the instant case.

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[1] In discussing the bank enhancement, the opinion does note that the defendants preserved the right to appeal the application of those Guidelines enhancements that they contested at sentencing. (Opinion at 6). This provision, however, was not discussed in the waiver section of the opinion.

For these reasons, the panel should grant rehearing to address the specific provision in the plea agreement that allows for an appeal of any guidelines enhancements that the defendants contested at the sentencing hearing.

III. THIS COURT'S HOLDING IN *PIRANI* APPLYING A PLAIN ERROR STANDARD OF REVIEW SHOULD BE REEVALUATED BY THE COURT *EN BANC*, IN THAT IT IS NOT FAIR OR REASONABLE TO REQUIRE A PARTY TO MAKE A SPECIFIC OBJECTION PRE-*BLAKELY* WHEN NO PARTY COULD HAVE REASONABLY FORESEEN THIS DRAMATIC CHANGE IN THE LAW, AND BECAUSE THERE IS A CIRCUIT SPLIT ON THE APPLICABILITY OF THE PLAIN ERROR STANDARD

The panel opinion determined that even if the issues had not been waived, there was no plain error in the district court imposing an enhancement based on judicially-found facts. (Opinion at 6). This ruling is consistent with Eighth Circuit cases which have held that a failure to make a specific objection to the mandatory nature of the Sentencing Guidelines, or a specific Sixth Amendment challenge, results in a plain error standard of appellate review. *See, e.g., United States v. Pirani*, 406 F.3d 543, 550-52 (8th Cir. 2005) (en banc). Appellants respectfully submit that this important question of law should be revisited in light of circuit precedence prior to *Blakely* and in light of the recent split of other circuit courts in the aftermath of the *Booker* decision.

It is not reasonable to require a criminal defendant to make a specific *Booker/Blakely* type of objection, prior to the issuance of either opinion, which is totally contrary to

circuit precedence in effect at the time of sentencing. In the context of *Booker/Blakely* error, the clear and unambiguous law in this circuit in effect at the time of sentencing and prior to *Blakely*, was that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not apply to Sentencing Guidelines calculations and enhancements. *See, e.g., United States v. Banks*, 340 F.3d 683, 684-85 (8th Cir. 2003) (describing *Apprendi* argument that a sentencing court cannot judicially find facts by a preponderance of the evidence as "frivolous" and noting that the Eighth Circuit has "squarely rejected" this argument before); *United States v. Alvarez*, 320 F.3d 765, 766-67 (8th Cir. 2002) ("[W]e have squarely rejected these contentions" that *Apprendi* invalidated findings under Guidelines); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 157 (2003); *United States v. Diaz*, 296 F.3d 680, 683 (8th Cir. 2002), *cert. denied*, 537 U.S. 940 (2002). In light of these holdings, it is difficult to imagine how a party can now be penalized by application of the restrictive plain error standard for failure to make a specific objection challenging the mandatory nature of the Guidelines that was contrary to all circuit precedence and even labeled as "frivolous" by one opinion.

It is perhaps for this reason that before *Pirani*, some panel opinions from the Eighth Circuit concluded that a general objection was sufficient to preserve *Booker/Blakely* error. *See, e.g., United States v. Coffey*, 395 F.3d 856, 860-61 (8th Cir. 2005), *reh'g en banc granted*, (April 1, 2005); *United States v. Selwyn*, 398 F.3d 1064, 1066-67 (8th Cir. 2005); *United States v. Sdoulam*, 398 F.3d 981, 995 (8th Cir. 2005); *United States v. Fox*, 396 F.3d 1018, 1026-1027 (8th Cir. 2005). Although these opinions were overruled by

Pirani, 406 F.3d at 550, their conclusions should be reconsidered by the Court *en banc*.

Further, the Court *en banc* should reevaluate this important question of law, as other circuit courts have reached varied conclusions about the applicability of *Booker* to cases pending on direct review. For example, the Second, Seventh, Ninth and D.C. Circuits have held that prejudice in the context of *Booker* plain error can only be assessed by a limited remand to the district court for a determination of whether the same sentence would have been imposed under an advisory guidelines system. *See, e.g., United States v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005); *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005); *United States v. Ameline*, 409 F.3d 1073, 1086 (9th Cir. 2005). The Fourth and Sixth Circuits have applied the plain error standard, but have concluded that a *Booker/Blakely* issue can meet the prejudice prong of the plain error test. *See, e.g., United States v. Hughes*, 401 F.3d 540, 548 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369, 380 (6th Cir. 2005).

There is no question that *Booker* applies to all cases pending on direct review. *See Booker*, 125 S. Ct. at 769. Because there is such a wide circuit split on this issue, this Court should reevaluate its holding in *Pirani*.

IV. THE COURT *EN BANC* SHOULD ADDRESS THE SCOPE OF THE ENHANCEMENT FOR SUBSTANTIALLY JEOPARDIZING THE SAFETY AND SOUNDNESS OF A FINANCIAL INSTITUTION AS A MATTER OF FIRST IMPRESSION WHERE THE DEFENDANTS DID NOT HAVE ANY BUSINESS RELATIONSHIP WITH THE BANKS IN QUESTION, WHERE THE BANKS IN QUESTION WERE WARNED ABOUT THEIR OVER-CONCENTRATION OF CREDIT PRIOR TO THE FRAUDULENT CONDUCT, WHICH CONTRIBUTED TO THEIR FINANCIAL CONDITIONS AFTER THE CONDUCT, AND WHERE THE BANKS NEVER FELL TO THE LOWEST BANK RANKING AND WERE ABLE TO TAKE IMMEDIATE CORRECTIVE MEASURES TO RESTORE THEIR CONDITION

The defendants operated a cattle buying and management service. At sentencing, the district court found that a four level enhancement should apply because the conduct substantially jeopardized the safety and soundness of several financial institutions, pursuant to U.S.S.G. § 2F1.1(b)(8)(A). The panel opinion affirmed this finding. (Opinion at 6-10).

The institutions in question did not become insolvent, did not substantially reduce benefits to pensioners or insureds, were not unable on demand to refund any deposit, payment or investment, and were not so depleted of assets as to be forced to merge with another institution in order to continue active operations. *See* U.S.S.G. § 2F1.1, comment. (n.20). The panel opinion noted that the only question is whether the defendants' conduct placed any bank in "substantial jeopardy" of becoming insolvent or being forced to merge. (Opinion at 6).

The defendants argued on appeal that the enhancement should not apply, as they did not have a direct business relationship with any of the banks in question. App. Br. at 35-40. Citing the Seventh Circuit decision in *United States v. Collins,* 361 F.3d 343, 349 (7th Cir. 2004), the panel concluded that a fraudulent act need not be directly targeted at a financial institution in order for the enhancement to apply, so long as the institution is harmed as a collateral effect. (Opinion at 8). The Appellants respectfully submit that there must be some type of connection between the wrongful conduct and the financial institutions in question for the four level enhancement to apply. It does not appear that the Eighth Circuit has addressed the situation where the enhancement is applied to a financial institution that was not involved in any business relationship with the defendants.

Further, the banks themselves created the over-concentration of credit that led to their condition. The panel opinion states that while concentration of credit was a concern, the concentration in a single source of repayment "is not bad." (Opinion at 9). The opinion states that the offense need not be the sole cause of the jeopardy to the bank's safety and soundness. (Opinion at 9).

The Appellants submit that the panel opinion overlooked key facts concerning the banks which demonstrate that their condition immediately after the offenses was created by the bank's lending practices. For example, the FDIC regulators warned both Elkhorn Valley and the Bank of Madison that they had an over-concentration of debt in cattle investments. Sent. Tr. at 27, 50. After the offenses in question, the regulators attributed the banks'

downgraded condition to their respective lending practices. With respect to Elkhorn, the regulators noted after the offenses:

> Management and board performance is deficient given the level of problems and excessive risk exposure. Most of the bank's financial problems stem from the large loan losses associated with the Eggerling et al. lines. Inadequate diversification of risk in the loan portfolio is a primary factor contributing to the extent of the losses.

Sent. Tr. at 48. With respect to Madison, the regulators similarly noted as follows:

> While many of the financial problems stem from the large loan losses caused by the cattle fraud scheme, the losses and overall increase in classifications were amplified by deficient management practices and must be corrected.

Sent. Tr. at 50.

The panel opinion overlooks these important facts that the banks created an over-concentration problem, in direct contravention of regulator warnings, which resulted in their overall, downgraded condition. The exceptional question of importance is whether it is fair to significantly increase a defendant's sentence for "substantially jeopardizing" the safety and soundness of a bank where the defendant did not have any direct business relationships with that bank and where that bank made poor loan diversification decisions, against the advice and warnings of regulators, that greatly amplified their condition once the offenses came to light.

The panel opinion states that the "fighting issue" is whether the banks in question were placed in "substantial jeopardy" of becoming insolvent. (Opinion at 9). The panel opinion concludes that the significant losses and resulting precarious position satisfy the purpose of the enhancement. (Opinion at 9-10). The Appellants respectfully submit that neither factor is a proper standard under the guideline provision.

The fact that the banks and its customers suffered "significant losses" is reflected in the amount of loss calculated pursuant to U.S.S.G. § 2F1.1(b)(1) (fraud table). Further, a showing of a "precarious position" does not equate with "substantial jeopardy" of insolvency. None of the banks in question fell to the lowest composite regulatory rating of 5, which notes that a bank has extremely unsafe and unsound practices or conditions, and that failure is "highly probable." App. at 65. The lowest rating of 4 indicates that failure is a "distinct possibility if problems and weaknesses are not satisfactorily addressed and resolved." App. at 65. A rating of 4 does not mean that failure is likely or probable.

In both instances, Elkhorn and Madison were able to take corrective measures (primarily the injection of capital) within a short amount of time. Sent. Tr. at 10, 29, 35, 40, 54. The panel opinion indicates that Elkhorn remained undercapitalized even after a capital infusion. (Opinion at 9). However, the panel opinion overlooks the fact that Elkhorn and Madison were both restored to a rating of 2 after a period of time. Because the institutions never fell to a level 5, and because the institutions were able to take swift corrective measures to restore their condition, Appellants submit that the banks were not in "substantial

jeopardy" of insolvency. The Court *en banc* should address the important and exceptional question of law concerning the proper scope of the enhancement for substantially jeopardizing the safety and soundness of a financial institution.

WHEREFORE, for all of the above reasons, the panel should rehear this matter, or alternatively, the Court should vacate the panel opinion, grant rehearing *en banc*, and vacate the sentence imposed in this case and remand the matter for further sentencing proceedings.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the decision of the panel raises the questions of exceptional importance regarding the application of the plain error doctrine to *Booker*/*Blakely* errors, as well as the proper interpretation of the Sentencing Guidelines enhancement for substantially jeopardizing the safety and soundness of a financial institution in a situation where the defendants did not have a business relationship with the banks, where the banks created an over-concentration of credit which greatly amplified the effect of the offense conduct, and where the banks did not fall to the lowest regulatory

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Case No. 02-00312-01/
v.	)	02-CR-W-FJG
	)	
GEORGE L. YOUNG &	)	
KATHLEEN I. MCCONNELL,	)	
	)	
Defendants.	)	

DEFENDANTS' JOINT
SENTENCING MEMORANDUM

COME NOW the defendants George L. Young and Kathleen I. McConnell, by and through their respective counsel, and respectfully submit this Sentencing Memorandum in the above-referenced case, pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Sentencing is presently scheduled for May 24, 2004.

Mr. Young and Ms. McConnell have thoroughly reviewed the Presentence Investigation Report ("PSR") with counsel and have discussed all issues with respect to sentencing in this case. Further, Mr. Young and Ms. McConnell jointly submitted to the probation office their various written objections and/or comments to the PSR. These objections and comments are included in the addendum to the PSR. This Memorandum is respectfully filed to assist the Court in determining an appropriate sentence in this case.

I. INTRODUCTION

Mr. Young and Ms. McConnell voluntarily entered their pleas of guilty to each count of a five count indictment returned in this case. The conduct underlying these charges was voluntarily disclosed by the defendants to the federal authorities on August 10, 2001. Since that time, the defendants have provided extensive and substantial cooperation to the federal criminal authorities with respect to document retention and hours of proffer sessions. The defendants have also assisted with a cash analysis prepared by the FBI which demonstrates that the defendants did not line their own pockets from the ill-gotten gains in this case. These efforts are detailed more fully below.

The guilty pleas in this case also avoided a lengthy criminal jury trial that would have been extremely complex and document-intensive. In addition to the guilty pleas in the federal criminal case, the defendants have cooperated extensively with bankruptcy authorities in the companion bankruptcy proceedings. The defendants also cooperated in parallel civil proceedings, and assisted the FBI in preparing a financial analysis that traced the monies through the defendants' business entities.

The PSR recommends substantial ranges of punishment for each defendant. With respect to Mr. Young, the PSR recommends a guideline range of 108 to 135 months imprisonment (Young PSR at ¶ 78). With respect to Ms. McConnell, the PSR recommends a guideline range of 87 to 108 months imprisonment (McConnell PSR at ¶ 71). This memorandum challenges the recommended four level enhancement to the base offense levels of both defendants for "substantially jeopardized the safety and soundness of

financial institutions." Mr. Young challenges the two level enhancement for violation of prior administrative decree. In addition, both defendants move this Court to consider a downward departure from the applicable guideline range on the bases of voluntary disclosure of the offense, that the loss overstates the seriousness of the offenses, and extraordinary acceptance of responsibility. Further, the cumulative effect of the overlapping enhancements at the upper end of the Guidelines provides another basis for downward departure.

II. SUMMARY OF THE PLEA AGREEMENT

The grand jury indictment was returned on November 7, 2002. PSR at ¶ 1. The defendants were released on bond on November 18, 2002. PSR at ¶ 2. The defendants have abided by all terms and conditions of pretrial supervision while released on bond. PSR at ¶ 6. The defendants voluntarily entered their guilty pleas in open court on October 24, 2003. The guilty pleas were the result of a plea agreement between the defendants and the United States. The highlights of the plea agreement are as follows:

1. Both defendants agreed to voluntarily enter their pleas of guilty to Counts One through Five of the indictment. The defendants provided an extensive factual basis for their guilty pleas in the plea agreement.

2. The United States agreed not to file any additional charges in the Western District of Missouri, the District of Nebraska, the Northern and Southern Districts of Iowa, the District of Kansas, and the Eastern District of Missouri.

3. The defendants agreed that the amount of loss was $160,000,000.00.

4. The United States submitted that the following guidelines are applicable to this case:

a. Base offense level of 6 under U.S.S.G. § 2F1.1(a).

b. An 18 level increase for loss under U.S.S.G. § 2F1.1(b)(1)(S).

c. A 2 level increase for more than minimal planning.

d. A 2 level increase (with respect to Mr. Young only) for violation of a prior, specific judicial or administrative order not addressed elsewhere in the guidelines.

e. A 2 level increase for sophisticated means.

f. A 4 level increase because the offense substantially jeopardized the safety and soundness of a financial institution.

g. A 3 level decrease for acceptance of responsibility.

5. The defendants reserved their rights to contest any guideline calculations and to argue that the amount of loss may be overstated under U.S.S.G. § 2F1.1, comment. (n.11).

This Court ordered the preparation of a presentence investigation report. The defendants received a draft version of the PSR and responded to the probation office with various comments and/or objections. This matter is now properly before the Court for sentencing.

cause of the banks' financial situation and did not jeopardize the safety and soundness of these three banks.

The FDIC, based on its review of the banks, directed that certain capital infusions occur in Elkhorn and Madison. The banks obtained capital infusions and satisfied the requirements set forth by the FDIC.

The government contends, and the PSR recommends, that the criminal conduct in the present case substantially jeopardized the safety and soundness of three financial institutions: Elkhorn, Madison and Beemer. PSR Add. at p. 3. The defendants object to this enhancement and submit that they did not substantially jeopardize the safety and soundness of these financial institutions.

In the 2000 edition[2] of the Sentencing Guidelines, Section 2F1.1(b)(8)(A) provides as follows:

> If the offense –
>
> (A) Substantially jeopardized the safety and soundness of a financial institution
>
> * * *
>
> increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

The definition and application of this enhancement are set forth in Application Note 20, which states:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a

[2] The Plea Agreements stipulate the 2000 Guidelines apply in this case. *See* McConnell Plea Agreement at 11.

> financial institution" if, *as a consequence of the offense*, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable to demand to refund fully any deposit, payment or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

U.S.S.G. § 2F1.1, comment. (n.20) (emphasis added).

None of these things happened. The evidence shows that the three banks did not become insolvent and were not forced to reduce benefits. There is no showing that the three banks were unable to refund any deposit or were forced to merge with another institution. The remaining question is whether the banks were placed in "substantial jeopardy" of any of the above and if so, if this occurred as a consequence of the offense.

Admittedly, defendants' conduct did cause a loss to the Eggerling group. It is not, however, evident that the banks were in "substantial jeopardy" in a way contemplated by the Guidelines. Here, the banks' losses required an infusion of capital. The banks received such capital and continued to operate. While the term "substantial jeopardy" is not defined in the Guidelines, it obviously contemplates the imminence of a condition. Here, the Eggerling group loan losses had an impact on the banks' overall financial condition, however, it did not create an imminent threat of insolvency and the banks have subsequently restored themselves to an overall acceptable condition with the FDIC. Accordingly, the evidence is insufficient to conclude that the banks were in substantial

jeopardy of any of the conditions set forth in Application Note 20.

Further, the banks themselves created the position that led to their losses. The evidence reveals that it was not defendants', but rather the banks' management and inadequate diversification, which created the banks' losses. According to the FDIC reports and analysis, the primary factor causing the extent of the banks' losses was their own "excessive risk exposure," "inadequate diversification of risk," and "management's deficient policies." FDIC Report of Examination, Bank of Madison, p. 4 (*See* Defendants' Exhibit 1); FDIC Report of Examination, Elkhorn Valley Bank & Trust, p. 1-2 (Recommendation Memorandum) (*See* Defendants' Exhibits 1 and 2).

As stated by Mr. Cordes, the FDIC examiner and author of the October 2, 2001, FDIC Recommendation Memorandum on Elkhorn, while the bank's loan losses were "partially related to third party fraud," it was "management's deficient policies and practices on a concentration of credit [that] *directly* resulted in the overall severe decline in the financial condition of the bank." Recommendation Memorandum, p. 1 (emphasis added). (*See* Defendants' Exhibit 6). As the financial soundness of the banks was attributable to the banks' management and internal policies, rather than defendants' actions, the imposition of a four point enhancement under U.S.S.G. § 2F1.1(b)(8)(A) is improper. *See United States v. Bruce*, 909 F. Supp. 1034, 1044-45 (N.D. Ohio 1995) (holding that where defendant's fraudulent action covered up but did not create insolvency, the enhancement was not applicable).

Prior to and regardless of the cattle loan losses to the Eggerling group, the banks put themselves in danger of

losses by failing to comply with FDIC rules and regulations. Banks must take precautions with respect to the concentration of loans. Long before Elkhorn was affected by the Eggerling loans, it was advised that the concentration of its loans with the Eggerling group was not a prudent risk management situation and that diversification was necessary. (*See* Defendants' Exhibit 2, p. 67). Elkhorn's excessive volume of assets subject to adverse classification existed even without consideration of the Eggerling group loans. (*See* Defendants' Exhibit 6, p. 3) (noting that the pertinent ratio without the Eggerling group loans would be 38%, which is a score "still higher [worse] than the classification levels at the prior FDIC examination"). Consequently, even when the Eggerling group credit was charged-off, the banks' excessive adverse classification remained high and in violation of FDIC regulations. *Id.* The enhancement at U.S.S.G. § 2F1.1(b)(8)(A) was meant to be imposed where fraud "seriously degrades an otherwise sound institution." *United States v. Rennert,* 2003 WL 345339 (E.D. Pa. 2003) at *3. As evidenced by the FDIC reports and memoranda, these banks were not "otherwise sound" thus, the enhancement should not apply.

The same situation was true at Madison. In a Profile Report by the FDIC Board of Governors Memo dated February 14, 2002, (*See* Defendants' Exhibit 3) it was noted that "even if the Eggerling et al. group loans were excluded" from the classification totals, overall loans for the Bank of Madison would have increased from the loans reported at the prior examination and as a result of the "significant increase in classified credits, the allowance for loan and lease losses and earning are considered deficient." (*See* Defendants' Exhibit 3, p. 3). This inspection

rated management of the bank as "fair" and found that the present financial condition of the bank was unacceptable and a "direct result of significant loan losses caused by the aforementioned deterioration in asset quality and from deficient management practices that must be corrected." *(Id.*, p. 4).

The little information provided on Beemer also precludes application of the enhancement. The Bank Profile regarding First National Bank of Beemer shows that the lowest safety and soundness rating the bank received was in 1985 – years before defendants' actions could have had any impact on the bank's soundness. Further, there is no evidence that Beemer was affected by the Eggerling group loans – no review of the Beemer bank or any information as to its soundness has been produced. Indeed, whether Beemer was ever in substantial jeopardy of the conditions in Application Note 20 as well as any possible cause of a jeopardized status is totally absent in the evidence. Speculation as to the existence of such a situation at Beemer, as well as a possible cause, cannot warrant an application of the enhancement.

The evidence that does exist reveals that the banks placed themselves in financial difficulty through actions unrelated to the conduct at issue for this Court. The evidence is not that defendants' behavior warrants the enhancement; rather, the evidence is that the banks' behavior put themselves at risk. Accordingly, the enhancement should not apply. *See United States v. Rennert*, 2003 WL 345339 (E.D. Pa. 2003) (enhancement not appropriate where the defendants did not cause the insolvency).

The defendants in this case are being punished significantly for their unlawful conduct. However, these

defendants should not receive extra punishment for the financial conditions of banks that knowingly assumed risk of overexposure on loans despite warnings of regulators. The defendants did not do business with these banks and certainly could not control or otherwise impact the manner in which these banks conducted their loan portfolios. Certainly, the defendants did not somehow target or set out to perpetuate a fraud on these particular institutions. For the foregoing reasons, defendants respectfully requests that the Court decline to impose the four level enhancement found at U.S.S.G. 2F1.1(b)(8)(B) for both defendants. If the four level enhancement is not imposed, the offense level for Ms. McConnell would be 25 with a corresponding guideline range of 57 to 71 months. The offense level for Mr. Young would be 27 with a corresponding guideline range of 70-87 months.

B. Objections to Paragraphs 30 & 43 (Young) Enhancement for Violation of Prior Administrative Order U.S.S.G. § 2F1.1(b)(4)

Defendant Young has also objected to the two level enhancement recommended in the PSR for his alleged violation of a prior administrative order. PSR at ¶¶ 30, 43. The orders at issue involved Mr. Young's activities with entities that were not part of the facts of the current case. The orders at issue date back to 1979 and 1986. PSR at ¶ 30. It is improper to impose this two level enhancement in light of the plea of guilty to Count Four of the indictment. This count alleged that Mr. Young made false entries into an account, record and memoranda that is required to be kept by any person, partnership or corporation subject to the Packers and Stockyards Act. *See* Count Four of the Indictment. Because Count Four alleges a

record keeping count related to the Packers and Stockyard Act, which is addressed in the base offense level for Count Four, it constitutes impermissible double counting to also impose an additional two levels because of an alleged violation of the prior administrative orders that contained the same record-keeping requirement. *See United States v. Werlinger,* 894 F.2d 1015, 1017-18 (8th Cir. 1990) (impermissible to apply obstruction of justice enhancement where the conduct was fully accounted for in the guideline defining the base offense level).

IV. DEFENDANTS' JOINT SUGGESTIONS IN SUPPORT OF MOTION FOR DOWNWARD DEPARTURE

A. Departure Authority in General

When the Sentencing Reform Act was enacted in 1984, Congress sought to implement a system that preserved a court's sentencing discretion in certain cases. *See, e.g.,* S. Rep. No. 225, 98th Cong., 1st Sess., 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234 (noting that sentencing guidelines system "will not remove all of the judge's sentencing discretion."); *Mistretta v. United States,* 488 U.S. 361, 363 (1989); *Koon v. United States,* 518 U.S. 81, 98 (1996) (noting that a district court's decision to depart embodies the traditional exercise of

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